**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Sea-Land Service, Inc.

File: B-270504

Date: March 15, 1996

Raymond S. E. Pushkar, Esq., and Michael A. Hopkins, Esq., McKenna & Cuneo, for the protester.
Richard S. Haynes, Esq., E. Duncan Hamner, Esq., and Charna J. Swedarsky, Esq., Military Sealift Command, for the agency.
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DIGEST

1. Protest contention that a contract clause reflecting the statutory mandate of the McCumber Amendment to the Cargo Preference Act of 1904, 10 U.S.C. § 2631 (1994)--restricting shippers dealing with the Department of Defense to charges not higher than those charged private persons--is ambiguous is denied where the clause at issue merely establishes a price ceiling for such services, and shifts some of the responsibility for assuring that this ceiling is not breached to the potential offeror, who is in the best position to be aware of its own commercially available tariffs for such services.

2. Liquidated damages provisions in a solicitation are unobjectionable where the record shows that the stated amounts represent a reasonable assessment of the damges to the government due to the contractor's failure to perform, and thus are not punitive, excessive, or otherwise unreasonable.

DECISION

Sea-Land Service, Inc. protests the terms of request for proposals (RFP) No. N62387-95-R-8150 ("the Alaska RFP"), issued by the Military Sealift Command (MSC) for ocean and intermodal transportation of Department of Defense (DOD) breakbulk and containerized cargo between specific points in the continental United States (CONUS) and points in the state of Alaska from December 1, 1995, through November 30, 1996. Sea-Land protests that the RFP: (1) is ambiguous in three areas, and that the ambiguities prevent potential offerors from preparing a reasonable, intelligent estimate of the government's requirements; and (2) contains unenforceable penalties in the guise of liquidated damages.

We deny the protest.

BACKGROUND

The RFP was issued on September 29, 1995, to obtain rates and services for shipping cargo to and from Alaska. Carriers were invited to provide shipping rates for government cargo on their regularly scheduled commercial routes in the same vessels and at the same time as they ship commercial cargo. In addition, carriers were invited to provide rates for ancillary services, such as loading or unloading containers, and equipment charges. The contracting scheme here envisions that accepted rates and charges will be published in MSC's "Alaska Container Agreement and Rate Guide." Using this guide, the Army's Military Traffic Management Command books transportation of cargo for individual DOD service components with the carrier, whose rates offer the lowest overall cost to the government, and who can meet the delivery requirements of the cargo.

The Alaska RFP anticipates multiple awards of fixed-rate, indefinite quantity requirements contracts, which do not impose minimum transit times, sailing frequencies, or cargo accommodation requirements. Rather, the government's orders are placed using the carrier's regularly scheduled commercial sailings. The carriers agree to transport such cargo as the government might tender based upon the carrier's accepted rates or, if applicable, its lower commercial rates, but the RFP does not obligate the carrier to promise the government a minimum amount of space in any vessel.

LIMITATION OF GOVERNMENT LIABILITY CLAUSE

One of Sea-Land's five specific challenges to the terms of the RFP--i.e., its claim that the RFP's "Limitation of Government Liability" clause is ambiguous because it vitiates the consideration necessary to make enforceable any contract awarded under this RFP--was recently considered and sustained by our Office in a protest brought by Sea-Land against the same agency and the same contract clause. See Sea-Land Serv., Inc., B-266238, Feb. 8, 1996, 96-1 CPD ¶ ___. In response to our decision, the agency amended the RFP here to delete the "Limitation of Government Liability" clause. Thus, this basis of protest is academic.

LOWEST PUBLISHED COST CLAUSE

Sea-Land challenges the inclusion of clause H-6.2, which, the protester argues, makes uncertain the rates, terms, and conditions which will apply to the transportation services ordered by the government. Sea-Land also claims that the clause makes the contract unenforceable for lack of consideration. We disagree on both counts.

Clause H-6.2 provides as follows:

> "**Shipment Under Public Tariff Terms and Conditions.** Notwithstanding the rates, terms and conditions stated herein, the Government shall be provided transportation from the Carrier on the routes covered herein under the rates, terms and conditions set forth in public tariffs of the Carrier that are available to the public, if such published tariffs provide lower overall costs to the Government than rates, terms and conditions under this contract for comparable commodities."

The issue of the applicable rate for transporting government cargo is not a new one. The Cargo Preference Act of 1904, 10 U.S.C. § 2631 (1994), and specifically, the so-called McCumber Amendment thereto, restricted American shippers dealing with DOD "to charges not higher than those made for transporting like goods for private persons." See United States Lines Co. v. United States, 223 F. Supp. 838, 844 (S.D.N.Y. 1963), aff'd on other grounds, 324 F.2d 97 (2d Cir. 1963); Sea-Land Serv., Inc., Armed Services Board of Contract Appeals No. 46,608, Mar. 2, 1995, 95-1 BCA ¶ 27,539. Accordingly, clause H-6.2 merely reflects the government's statutory right to ship cargo at rates no higher than the carrier's comparable commercial rates.

We also fail to see any connection between the presence of this clause and a lack of consideration for the instant contract, as asserted by the protester. This clause does not alter the underlying obligations of the parties with respect to a requirements contract for the shipping of cargo, see generally Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982); rather, it merely establishes a price ceiling that will apply to this contract, even if the parties, through oversight or omission, fail to set prices in accordance with the ceiling. Further, since potential offerors are clearly in the best position to be aware of their own commercially available tariffs for similar services, Sea-Land cannot reasonably claim that this clause makes the terms of the contract ambiguous.

LEASING CLAUSE

Sea-Land also challenges as ambiguous the RFP's leasing clause on the grounds that the clause contradicts itself. Specifically, Sea-Land complains that clause H-40 requires carriers to furnish containers, flatcars, and chassis (and in the case of non-self-sustaining refrigerated containers, a generator set) "for use in connection with land and ocean transportation of [g]overnment cargo arranged under this agreement." While the clause provides that "[e]quipment so leased may be transported aboard any vessel designated by the [g]overnment and may be transported inland by any means available to the [g]overnment," it also prohibits the leasing of "containers for storage or other purposes unrelated to the furnishing of transportation pursuant to this contract, unless otherwise mutually agreed between

the [g]overnment and the [c]arrier." According to Sea-Land, the provision permitting the agency to transport leased equipment by any vessel designated by the government contradicts the prohibition on leasing equipment for purposes unrelated to this transportation contract.

As a general rule, a contracting agency must give offerors sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. C3, Inc., B-241983.2, Mar. 13, 1991, 91-1 CPD ¶ 279. The mere allegation that a solicitation is ambiguous, however, does not make it so. RMS Indus., B-248678, Aug. 14, 1992, 92-2 CPD ¶ 109. There is no requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk or remove every uncertainty from the mind of every prospective offeror. A&C Bldg. and Indus. Maintenance Corp., B-230270, May 12, 1988, 88-1 CPD ¶ 451.

The agency explains that the purpose of the clause is to retain flexibility to respond to ever-changing and expanding requirements. While the agency states that it does not expect to use the clause often, it wants to be able to transport a carrier's loaded or unloaded container already in transit (or in place ready for transit) in another agreement carrier's vessel, or in a government-controlled vessel, when there is a need to do so.

Our review of the clause reveals nothing contradictory. As quoted above, the clause begins by acknowledging that there will be a need to lease equipment--identified as containers, flatcars, chassis, and in some cases, generator sets--in connection with the contract's requirement to transport cargo. Attached to this basic requirement is the proviso that, if necessary, the government reserves the right to transport a carrier's leased equipment on another carrier's vessel, or transport the equipment by some other means selected by the government. A more narrowly drawn provision--addressing storage containers only--bars the government from leasing storage containers for purposes unrelated to the transportation of cargo pursuant to this contract (unless mutually agreed between the parties). Sea-Land's conclusion that the reserved right to use leased equipment to transport cargo on another carrier's vessel (or by some other means) runs afoul of the more narrowly drawn bar regarding the unrelated lease of storage containers, except by mutual agreement, is contradicted by the clause itself, which, as indicated, clearly defines the respective rights of the parties.

Sea-Land also asserts that the leasing clause violates Federal Acquisition Regulation (FAR) § 15.802(c),[1] which bars contracting officers from including in a contract

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[1]Sea-Land's protest cites FAR § 15.802(b)(3), however, the referenced language is now set forth at FAR § 15.802(c), pursuant to changes published in Federal Acquisition Circular No. 90-32, Sept. 18, 1995.

price "any amount for a specified contingency to the extent that the contract provides for price adjustment based upon the occurrence of that contingency." We need not address whether this provision applies under the circumstances here since, even assuming that it does, Sea-Land's argument is both speculative and premature. First, we see no basis in this record to accept the premise of Sea-Land's argument--that the leasing rates are not adequate to compensate the carrier. The agency points out that the leasing rates are based on daily rental charges paid under other contracts. Other than its general assertion to the contrary, Sea-Land has not shown that the rates are inadequate. Second, it is premature to conclude that carriers will improperly inflate their proposed rates to reflect the financial risk allegedly imposed by the leasing clause, or that the contracting officer, at whom FAR § 15.802(c) is directed, will accept contract prices in contravention of that provision. In sum, we see no basis to conclude that inclusion of the leasing rates in the RFP will necessarily lead to the submission, and acceptance by the contracting officer, of prices in contravention of the FAR.

LIQUIDATED DAMAGES

Under the terms of the Alaska RFP, numerous liquidated damages provisions attach to the solicitation's performance requirements. For example, the solicitation stipulates payment of damages when a carrier fails to use government-provided automobile interior protection devices when shipping service members' privately-owned vehicles (POV), RFP § C-3.3.8.3, or when the carrier fails to ship a POV within 9 calendar days of receipt of the POV. RFP § C-3.7.2.1.[2] According to Sea-Land, the liquidated damages provisions set forth in the RFP are punitive, are not warranted in this solicitation, are unreasonably linked to interim steps within the transportation process, and are unrelated to any actual damages the agency will incur. Hence, Sea-Land contends the liquidated damages provisions of the RFP are unenforceable.

FAR § 12.202 specifically authorizes the use of liquidated damages provisions where the government reasonably expects to suffer damages if the contract is improperly performed and the extent of such damages would be difficult to ascertain. Integrity Management Int'l, Inc., B-260595; B-260595.2, June 27, 1995, 95-2 CPD ¶ 126. We review allegations that a solicitation's liquidated damages provisions impose a penalty because any solicitation providing penalties for inadequate performance, in addition to violating applicable procurement regulations, could adversely affect competition and unnecessarily raise the government's costs. Environmental Aseptic Servs. Admin. and Larson Bldg. Care, Inc., 62 Comp. Gen. 219 (1983), 83-1 CPD ¶ 194; Aquasis Servs., Inc., B-229723, Feb. 16, 1988, 88-1 CPD ¶ 154. Before we will

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[2]Other RFP requirements covered by liquidated damages provisions are found at clauses H-13, H-14, H-17, H-20, H-25.4, and C-6.

rule that a liquidated damages provision imposes a penalty, however, the protester must show that there is no possible relationship between the amounts stipulated for liquidated damages and losses which are contemplated by the parties. Integrity Management Int'l, Inc., supra.

We turn first to Sea-Land's contention that the liquidated damages provisions in this solicitation are punitive, unwarranted, and unreasonably linked to interim steps in transportation process. For example, Sea-Land highlights clause C-6 (as modified by amendments 0002 and 0006) which sets a $30 per day late fee for transportation reports required by the solicitation. According to Sea-Land, the agency conceded that this provision was punitive when the contracting officer advised potential offerors that a penalty was necessary to incentivize carriers to submit these reports in a timely fashion.

While Sea-Land is correct in its claim that the contracting officer used the term "penalty" in discussing this clause, she did so in response to a written question from a potential offeror, which described the late fee as a penalty. In addition, the contracting officer's mere use of the word "penalty" is not dispositive of whether these fees are impermissibly punitive. The agency explains that the reports at issue here are necessary to keep track of and transport a large amount of cargo safely and effectively, maintain visibility of the cargo, control cargo inventories, and pay carriers in a timely manner without disputes. In addition, in response to the offerors' questions, the agency agreed to lower the late fee from $50 to $30 per day in amendment 0006. Given the importance of these reports, the clear damage that arises from a carrier's failure to provide them in a timely manner, and the relatively minimal amount of the late fee involved, we conclude that the fee in this respect is not punitive.

Similarly, with respect to Sea-Land's complaint that some of the liquidated damage provisions are unreasonably linked to interim steps in the transportation process, the agency explains that its concern is not just the final delivery of cargo, but the continued movement of an entire cargo transportation system. As a representative example, we see nothing unreasonable about the requirement at clause H-17 assessing damages against a carrier which fails to load cargo in time for a scheduled departure where the government provided the cargo within the time constraints set by the carrier. While Sea-Land complains that even if it misses the loading date it might still deliver the cargo more quickly than certain other carriers (such as barges that have longer transit times), its complaint misses the point. Once a carrier has been selected, the government's interest is in knowing that the cargo will be on its way as scheduled. Given this interest, we see nothing unreasonable about the use of liquidated damages to ensure that carriers perform as offered.

Finally, we conclude there is nothing unreasonable about the amount of damages envisioned by the solicitation, or the relationship between the stipulated damages and any actual damages that might be incurred by the agency. For example, the solicitation includes detention rates the government must pay for each day it delays a carrier's container or equipment beyond the time allowable. Detention rates are not intended to represent a rental or lease rate--rental or lease rates for such equipment are lower--but are a form of liquidated damages to compensate the carrier for the loss of use of the equipment. Compare RFP § H-25 with RFP § H-40 as modified by amendment 0005. In recognition of the role of detention rates in compensating carriers for their inability to ship cargo in equipment that has been tied up by the government, the agency adopted them as a reasonable assessment of damages to the government for the unknown actual value of each day that delivery of a container is delayed. In our view, the agency's argument that detention rates are appropriate estimates of damages for delay is buttressed by the fact that the actual damages for delayed shipment of a service member's possessions differ from one case to the next, and cannot be predicted with any certainty. Given the long-standing use of these charges by the carriers against the government, we see nothing unreasonable in their use in the opposite direction; in both cases, detention rates reduce the potential for disputes and permit the cargo shipping system to go forward smoothly and without delay.

The protest is denied.

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